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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PENA, SECRETARY OF TRANSPORTATION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN DIABETES ASSOCIATION IN SUPPORT OF PETITIONER

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PRELIMINARY STATEMENT

The importance of a complete remedy for the violation of a right is deeply rooted in the common law. In commenting on Magna Carta, Lord Coke stated:

"And therefore every Subject of this Realm, for injury done to him *bonis, terris, vel persona* [i.e. goods, lands, or person], . . . may take his remedy by the course of the Law, by any other subject . . . and have justice and right for the injury done him, freely without sale, fully without any denial, and speedily without delay.

"Hereby it appeareth, that Justice must have three qualities, it must be Libera, quia nihil iniquius venali Justitia [free, for nothing is more iniquitous than justice for sale]; Plena, quia Justitia non debit claudicare complete, for justice should not do things by halves]; & Celeris, quia dilatio est quaedam negatio [swift, for justice delayed is justice denied]; and then it is both Justice and Right.[1]

Indeed, for justice to do right it must be complete.

> "It is a vain thing to imagine a right without a remedy; for want of a right and want of a remedy are reciprocal.[2]

In more modern words, the value of a right is defined by the remedy available if that right is violated.

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[1] Coke, *Second Institute* 55-56 (4th Ed. 1671) quoted in Thompson *Magna Carta: Its Role in Making of the English Constitution,* 1300-1629, at p. 365 (1948).

[2] *Ashby v. White*, 2 Raymond 953 (1703).

QUESTION PRESENTED

Should the executive agencies of the Federal Government, and only those agencies, be exempt from paying damages for harm caused by their violation of the Rehabilitation Act?

STATEMENT ABOUT *AMICUS*

Amicus Curiae, the American Diabetes Association ("Association") is the nation's oldest, largest and leading voluntary health organization addressing diabetes-related concerns. The mission of the Association is to prevent and cure diabetes and to improve the lives of all people affected by diabetes.

The Federal Government impacts the lives of the more than 16 million Americans with diabetes in many and varied ways. The Federal Government is the largest single employer in the country and the executive agencies regulate and control many of the benefits, privileges and rights of people with

diabetes. From the Veterans' Administration's provision direct medical benefits to the Department of Transportation's regulation of licensing of commercial truck-drivers, executive agencies have a pervasive influence on the care and employability of Americans with diabetes.

It is in this context that *amicus* urges this Court not to eviscerate the protections of the Rehabilitation Act concerning discrimination by the Federal Government for Americans with diabetes.

ARGUMENT

NATIONAL POLICY REQUIRES THE FULL PROTECTION OF CIVIL RIGHTS FOR THE DISABLED AND THE OPPORTUNITY FOR FULL EQUITABLE AND LEGAL REMEDIES FOR THE VIOLATION OF THOSE RIGHTS.

A right without a remedy is a cruel irony and a fundamental injustice. In this case, the D.C. Circuit has declared that the Department of Transportation violated Lane's rights under the Rehabilitation Act and that he is entitled to reinstatement as

a student at the United States Merchant Marine Academy, but is not entitled to recover the compensatory damages to which the parties have stipulated. This is a classic example of a right without a remedy and justice by "halves".

Lane's struggle with the Merchant Marine Academy is representative of the daily struggle of millions of persons with diabetes. Every day, Americans with diabetes face the consequences of prejudice, stereotyping and unfounded fear about diabetes, and especially the work capacity of Americans with diabetes. Although Mr. Lane had his diabetes under "extremely good control" and that he "repeatedly achieved an 'outstanding' rating on a physical readiness exam", he was denied the opportunity for education and employment as a merchant marine officer. The trial court in *Lane v. Pena* summarized Lane's ability most eloquently when he stated:

> ". . . the government, through taxpayer dollars, also made an investment in his training and, as Lane's record shows, their investment

> was a good one. It is undisputed that, if Lane continues to control his diabetic condition, he will make a fine merchant marine officer. . . ."
>
> "Indeed, the Court observes that the government will likely benefit greatly from his service." *Lane v. Pena*, 867 F.Supp. 1050, 1071-1072 (D.C. Cir. 1994).

This case exemplifies the need for the Rehabilitation Act to shield the most vulnerable of our citizens from arbitrary and irrational discrimination based upon "prejudice, stereotypes and unfounded fear."[3] If James Lane can be turned away so capriciously from the window of opportunity, then the shroud of prejudice shall darken the future for all disabled Americans. Lane's vindication needs to be twofold: his right to opportunity must be protected and the damage he suffered must be compensated. Lane must be made whole.

This Court has already recognized that the availability of damage awards in civil rights suits serve both the broad

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[3] *School Board of Nassau County, Florida v. Arline*, 480 US 273 (1987).

public purpose of eliminating discrimination and the private purpose of making the victims whole. *See*: *McKinnon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879 (1995); *Hensley v. Eckerhart*, 461 U.S. 424 (1993). The potential of a damage award deters discriminatory practices and induces compliance with legislative mandates to protect Americans against such discrimination. *See*: *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651-652 (1980); *Smith v. Wade*, 461 U.S. 30, 50 (1983).

How can we justify a technical argument that the executive agencies of the Federal Government, who by purpose and design protect the most vulnerable of our citizens from arbitrary and unreasonable practices, cannot be held responsible for the full consequences of their own discriminatory practices? How can we expect these agencies to protect the rights of disabled Americans if they themselves cannot be held responsible for the full consequences of their own discriminatory

practices? How do we impress upon these agencies that the law must be followed if the only consequence for their own discriminatory practices is equitable relief for a single person?

If the Rehabilitation Act is to accomplish its purpose, remedies for discriminatory practices must be sharply focused and uniformly applied. The remedy must reflect all of the consequences of discriminatory practices, including damages.

According to the Rosalind A. Knapp most recent statistics, there are over 16 million Americans with diabetes, about 7% of our population. Unfortunately, new cases of diabetes are being diagnosed at the rate of approximately 1,800 per day or over 650,000 Americans each year.[4] Diabetes is a growing national health problem with significant economic impact. Over 50% of the Americans with diabetes are women. Nearly 10% of the Afro-American, Mexican-American, Cuban-

[4] *Diabetes Statistics,* National Diabetes Information Clearinghouse, National Institutes of Health (NIH Publication No. 96-3926) (1995).

American and Puerto Rican-American ethnic and racial groups have diabetes while native Americans have nearly a 50% incidence rate of diabetes. As Americans age, the incidence of diabetes dramatically escalates.[5] The incidence of diabetes in the protected portions of our population (race, ethnic, gender and age) is large and is growing geometrically. Not only do our fellow Americans of various races, cultures and ethnic backgrounds face discriminatory practices based upon who they are, the fact that they have diabetes creates for some entities a further rationale for discrimination.

Americans with diabetes face serious health complications which include heart disease, stroke, high blood pressure, blindness, kidney disease, nerve disease, amputation, complications of dental disease and complications of pregnancy.[6] The

[5] *Diabetes In America,* National Diabetes Data Group, National Institutes of Health (NIH Publication No. 95-1468) (1995).

[6] Ibid.

life-long economic burden is enormous for Americans with diabetes.[7]

Economic burdens of health care and minority status when added to discriminatory practices based on disability can be an overwhelming burden on a citizen's capacity to exercise his rights. To deny a full remedy for the enforcement of rights deters the pursuit of those rights to the detriment of both the individual and society. As "the poorest, least educated and largest minority in America", people with disabilities have enormous difficulty accessing legal representation and enforcing their basic civil rights. *See: City of Riverside v. Riviera*, 477 U.S. 561, 577 (1976); *S. Rep. No.* 101-116, 101st Congress, First Sess. at 9 (1989).

Those who are discriminated against because of their disability have the right to compensation for damages in every jurisdiction and against every defendant except against a federal

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[7] Ibid.

agency in the District of Columbia. As a nation, we deal with the rights of ethnic and racial minorities and offer them protection and relief from the oppression of ignorance and prejudice. As a nation, we reach out for gender equality to create an equal opportunity for all of our citizens. As a nation, we protect the disabled from denial of equal access and opportunity solely because of their disability. Now, in the District of Columbia, various protected groups already under the panoply of the many and varied civil rights acts are confronted with a new barrier of inequality.

It is unacceptable that "prejudice, stereotypes and unfounded fear" about diabetes should be permitted to stop the progress toward equal opportunity and fair and equal treatment for persons with diabetes. The barrier created by the District of Columbia will chill the enforcement of the rights of the disabled under the Rehabilitation Act.

The trial court elaborated on the history of the inconsistent conduct by the Merchant Marine Academy where some, but not all, disabilities had triggered disenrollment and where there had been no individualized assessment of an outstanding student. Arbitrary and inconsistent decisions are the historical burdens suffered by persons with disabilities and, in particular, persons with diabetes. The present case highlights the need for complete remedies for vindicated rights because of arbitrary and inconsistent discriminatory practices.

A recent settlement in *Kenneth Dugger v. Lloyd M. Bentsen, Secretary, U.S. Dept. of Treasury, (C.D. Cal. 1994)* (Civil Case No. 93-2631) illustrates the recognition of the need to compensate for damages caused by discriminatory conduct towards a person with diabetes. Mr. Dugger filed his action under the Rehabilitation Act "to correct the unlawful employment practices in the job selection process and to make the plaintiff whole". Mr. Dugger's claim was based upon the fact

that his diabetes was the sole cause of his non-selection as a criminal investigator (special agent) for the Department of Treasury. After winning his Motion for Summary Judgment on the substantive merits, Treasury agreed to compensate Mr. Dugger for lost retirement contributions, lost back pay, compensatory damages and attorney fees and costs for the litigation.

The *Dugger* case illustrates two important points. First, it is an articulation of the kinds of damages that are suffered by disabled persons when they are discriminated against and when they attempt to enforce their rights under the Rehabilitation Act. In Mr. Dugger's case settlement was for $67,000. If there was no hope of reimbursement, it would be the rare plaintiff that could afford to spend or risk this amount of money to pursue his rights no matter how egregious the discrimination. Second, the prospect of an economic settlement forced additional accountability on the management within a federal agency. The potential of damages focuses the need to make

lawful and responsible decisions. Without this economic accountability, there is no compelling pressure that will impact budgets and decision-makers so as to deter and discourage discriminatory practices.

CONCLUSION

Amicus, on behalf of 16 million Americans with diabetes, asks this Court to make Mr. Lane whole and provide the meaningful remedies of the Rehabilitation Act for disabled Americans when they are discriminated against by the Federal Government. Mr. Lane's Petition in this case stands for equal justice under the law and for a full and fair remedy under the Rehabilitation Act.

Respectfully submitted,

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